UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES CO., *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

11 Civ. 6990 (WHP)

ECF Case

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Defendants.

11 Civ. 7562 (WHP)

ECF Case

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant United States Department of Justice ("DOJ" or the "Government") respectfully submits this memorandum of law in opposition to plaintiffs' cross-motion for summary judgment and partial summary judgment and in further support of its motion for summary judgment in *The New York Times Co. v. United States Department of Justice,* 11 Civ. 6990, and partial summary judgment in *American Civil Liberties Union v. Federal Bureau of Investigation*, 11 Civ. 7562.

As set forth in the Government's memorandum of law in support of its motion ("Gov. Opening Br."), the Government properly withheld from disclosure the record at issue here—a classified report provided to Congress by the Attorney General and the Director of National Intelligence relating to an intelligence collection operation authorized by Section 215 of the USA PATRIOT Act (the "Report")—pursuant to Exemptions 1 and 3. The Government has explained in both an unclassified declaration and a classified declaration submitted *ex parte* and *in camera* that the Report is properly classified in its entirety because it describes a specific intelligence collection operation and public revelation of this operation would provide the United States' adversaries and foreign intelligence targets with insight into the Government's intelligence collection capabilities. Furthermore, the Report is exempt from disclosure under Section 102A of the National Security Act of 1947, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i), because, inasmuch as the Report describes a specific intelligence collection operation, its disclosure would reveal intelligence sources and methods.

In their opposition and cross-motion, plaintiffs do not seriously contend that the Government's explanation for withholding the Report is not logical or plausible—which is all it

need be in order for the Government to prevail on summary judgment. Instead, plaintiffs have attacked the Government's withholding primarily on the grounds that the declarations submitted by the Government are insufficient in various ways. Plaintiffs also rely on the novel argument that, regardless of the applicability of FOIA Exemptions 1 and 3, a classified document describing intelligence activities and containing sensitive intelligence sources and methods cannot be withheld because it constitutes "secret law."

None of plaintiffs' arguments regarding the insufficiency of the Government's declarations have any merit. As an initial matter, plaintiffs draw attention to FOIA's *de novo* standard of review, without acknowledging the deference that is owed to the Executive Branch's unique expertise in assessing the harm to national security that could result from release of information in the Report. Plaintiffs also speculate that the Report contains "abstract legal analysis," and they then posit that such legal analysis must be segregable from any classified information, despite the fact that the Government's submissions have consistently and specifically explained that the Report describes an intelligence collection operation and contains no segregable information. And although plaintiffs complain that the Government's public filings contain insufficient information to allow the Court to determine whether the record was properly withheld under FOIA Exemptions 1 and 3, the Government has submitted declarations that confirm a proposition that plaintiffs ultimately do not, and cannot, take issue with—namely, that disclosing information regarding a specific, secret intelligence collection operation to the nation's adversaries will harm national security. In its public filing, the Government has provided as much detail as possible, consistent with its obligation to maintain the secrecy of the information contained in the record, and with sufficient specificity to permit plaintiffs to participate meaningfully in the litigation. To the extent further information would facilitate the

Court's review, the Government has properly supplemented its public filings with a classified declaration submitted *in camera*. Taken individually or together, the Government's submissions describe the Report with the reasonable specificity necessary to allow the Court to undertake meaningful review.

Plaintiffs' argument that the Report cannot be withheld because it constitutes "secret law" is equally without merit. It is not accurate to characterize the Report as "secret law" that must be disclosed under FOIA. In fact, the concept of "secret law" has never been applied in the context of Exemptions 1 and 3, nor does it make any sense to import to this concept here. To be sure, the Report has been classified because it relates to intelligence collection activities, the disclosure of which would harm national security and undermine the effectiveness of the nation's intelligence tools. But FOIA does not require that the Government disclose a court-authorized, properly classified intelligence operation carried out pursuant to a public statute simply because plaintiffs have mislabeled it "secret law."

ARGUMENT

I. EXEMPTION 1 AUTHORIZES THE WITHHOLDING OF THE REPORT

A. The Report Is Properly Classified

The Government's declarations, including both the unclassified and classified declarations of Mark A. Bradley ("Unclass. Bradley Decl." and "Class. Bradley Decl.," respectively), establish that the classification of the Report is both procedurally and substantively proper. *See* Gov. Opening Br. at 7-9. First, the information in the Report has been reviewed by an original classification authority. *See* Unclass. Bradley Decl. ¶ 2, Class. Bradley Decl. Further, the information contained in the Report falls within one of the eight protected categories listed in Section 1.4 of Executive Order 13526. Specifically, the Report is covered by the

categories set forth in subparagraphs (c) and (g), which respectively authorize the classification of information concerning "intelligence activities (including covert action), intelligence sources or methods, or cryptology," and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security." E.O. 13526 § 1.4(c), (g); *see also* Unclass. Bradley Decl. at ¶ 8. In addition, the classified information in the Report is "owned by, produced by or for, or under the control of the United States Government," also as required by E.O. 13526. Unclass. Bradley Decl. ¶ 10.

As set forth in the Government's declarations, the release of the Report could be expected to cause exceptionally grave harm to the national security by providing the United States' adversaries and foreign intelligence targets with insights into the Government's foreign intelligence collection capabilities. Unclass. Bradley Decl. ¶ 9; Class. Bradley Decl. Mr. Bradley further explains that these insights "in turn could be used to develop the means to degrade and evade those collection capabilities." Unclass. Bradley Decl. ¶ 9. The Government has provided further information in its classified filing, including a more robust description of the contents of the Report and a more detailed description of the national security harm that would result from its release. *See* Class. Bradley Decl. The law is clear that "[a]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (internal quotation marks and citations omitted). The Government's explanation of harm, on the public record alone, meets that standard.

While plaintiffs may disagree with Mr. Bradley's assessment, their conjecture that release of the Report would strengthen rather than harm national security by "alleviat[ing] public concerns" and "reaffirming the nation's commitment to the rule of law," New York Times Memorandum of Law in Opposition to the Government's Motion for Summary Judgment and in

Support of Their Cross-Motion for Summary Judgment ("NY Times Br.") at 17 n.5, has no basis in either law or fact. While such arguments may be fodder for a vigorous political debate, they simply do not provide a legal ground for the overturning the Government's assessment of harm. Indeed, the Court should reject plaintiffs' effort to second-guess the Executive Branch's predictions of harm to national security, which is "a uniquely executive purview," *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926-27 (D.C. Cir. 2003), "because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of a particular classified record." *Id.* at 927. Unlike plaintiffs' uninformed speculation, which is entitled to no deference from the Court, the Government's determination of harm in national security cases is entitled to deference. *See id.* (noting that courts have "consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review" on this issue).

B. Plaintiffs' Attacks on the Government's Declarations Are Without Merit

Nevertheless, plaintiffs attack the Government's declarations as deficient for several reasons. First, plaintiffs argue that the Court should not grant deference to the Government's declarations. Second, plaintiffs argue that the unclassified declaration fails to sufficiently address whether the Report contains segregable "legal analysis." Third, plaintiffs argue that the unclassified declaration lacks the required level of specificity, and that the Government's use of a classified declaration is inappropriate. As set forth below, none of these arguments has merit.

1. The Standard of Review Calls for Deference to the Bradley Declarations

a. <u>The Court Should Defer to the Government's Assessment of National Security Harm</u>

Plaintiffs' suggestion that the Court should not grant deference to the Government's classification of the Report is inconsistent with well-established law. While plaintiffs are correct

that courts review *de novo* an agency's withholding of information in response to a FOIA request, *see* NY Times Br. at 9, "*de novo* review in FOIA cases is not everywhere alike," *Assoc. of Retired R.R. Workers, Inc. v. U.S.R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Plaintiffs disregard the case law requiring that, in assessing the Government's determination of whether disclosure would harm national security in cases involving Exemption 1, deference be given to agency affidavits. *See Wilner*, 592 F.3d at 76 (*citing Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927); *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978). With respect to national security matters, while *de novo* review provides for "an objective, independent judicial determination," courts nonetheless defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record." *Ray*, 587 F.2d at 1194.

Accordingly, "in the context of national security concerns, courts must accord *substantial weight* to an agency's affidavit concerning the details of the classified status" of a particular record. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quotation marks omitted) (emphasis in original); *see also Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983). Indeed, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *accord Wilner*, 592 F.3d at 73; *Diamond*, 707 F.2d at 79; *see also Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving the district court's use of "its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"). In other words, in FOIA cases involving Exemption 1, *de novo* review includes substantial deference to the Executive Branch with respect to the predicate national security findings underlying the classification of

documents. *Ctr for Nat'l Sec. Studies*, 331 F.3d at 927; *accord Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Fitzgibbon*, 911 F.2d at 766.

b. The Bradley Declarations Are Entitled To a Presumption of Good Faith

Moreover, the Government's declarations are entitled to a presumption of good faith. *Wilner*, 592 F.3d at 69. Plaintiffs suggest that the Court should not grant deference to the Government's declarations, arguing that there is reason to "suspect[]" bad faith in the Government's decision to withhold the Report because "[t]wo U.S. Senators have publicly said that the Government is misleading the public about" Section 215. NY Times Br. at 19. Neither of the cases upon which plaintiffs rely, however, support their argument. In *Wilner*, the National Security Agency provided a *Glomar* response to a FOIA request related to the Terrorist Surveillance Program ("TSP"). 592 F.3d at 75. The plaintiffs argued that no deference to the NSA's affidavits should be given because, the plaintiffs argued, the TSP was an unlawful program and the agency was attempting to hide its illegality. *See id*. The Second Circuit rejected the argument, finding no bad faith on the part of the agency because there was no "evidence" that the agency was acting to conceal "illegal or unconstitutional actions." *Id.* Similarly, in *Jones v. FBI*, 41 F.3d 238, 242-243 (6th Cir. 1994), the Sixth Circuit held that "where [] evidence [of underlying illegal conduct] is strong," the Government's affidavits would not be entitled to deference.

Plaintiffs have not provided any evidence that the Government is withholding the Report for the purpose of concealing illegal conduct. To the contrary, the intelligence collection operation described in the Report has been authorized by an Article III court. Plaintiffs do not claim that the two U.S. Senators have asserted that any illegal conduct has occurred. Rather, plaintiffs rely on statements that the Government is "misleading" the public. Even if these

statements were true—and they are not—they do not constitute evidence that the Government has classified the Report in order to conceal illegal conduct, as required by *Wilner*.[1]

Accordingly, in the absence of evidence of bad faith, where a court has enough information to understand why an agency classified information, it should not second-guess the agency's facially reasonable classification decisions. *Wilner,* 592 F.3d at 75 (according deference to agency declarations and stating that it "[could] not base [its] judgment on mere speculation that the NSA was attempting to conceal [] purported illegality . . . ."). *See also Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999).

2. The Report Does Not Contain Segregable "Abstract Legal Analysis"

Plaintiffs also argue that the Court should overturn the Government's classification determination based on their mistaken speculation that the Report contains "abstract legal analysis," *see* NY Times Br. at 11, that is functionally segregable from information regarding a classified intelligence collection operation. Although plaintiffs never explicitly define what they mean by "abstract legal analysis," it is appears that plaintiffs are attempting to create a

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[1] With respect to the statements of the Senators cited by the plaintiffs more generally, it also bears noting that courts have held that contrary views of the Legislative Branch, and even of former Executive Branch officials, regarding harm to national security are not sufficient to undermine an agency's affidavit even when, unlike here, those views are directly presented to the court in declarations. For example, in *Washington Post v. DOD*, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *19-20 (D.D.C. Feb. 25, 1987), the Washington Post sought a classified report describing certain military operations. In support of its request, the Washington Post submitted a declaration from Senator Edward Zorinsky. Senator Zorinsky had reviewed the report, and claimed in his declaration that release of the information contained in the report would not present a threat to national security. *Id.* The district court rejected this attempt to undermine the Government's declarations in support of its classification of the report, stating "[a]n affidavit that gives a view of national security harm differing from that presented by the government is alone not sufficient to undermine an agency's affidavit, even when submitted by an individual knowledgeable in the agency's area of expertise." *Id. See also Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421-22 (2d Cir. 1989) (declining to accept opinion of former admiral that classified information had been publicly disclosed and was therefore no longer classified); *Gardels v. CIA*, 689 F.2d 1100, 1106 n. 5 (D.C. Cir. 1982) (holding that affidavit of former CIA official attesting to lack of harm did not undermine agency's affidavits).

distinction between factual information about specific intelligence operations described in the Report and legal analysis. *See, e.g.,* NY Times Br. at 8, 11, 16 ("Plaintiffs seek access only to legal analysis and legal conclusions" but not "anything about specific and legitimately shielded intelligence sources or methods"). In their view, legal analysis would not tend to reveal the classified factual information. Based on this imagined distinction, plaintiffs argue that the Government is required to segregate the "abstract legal analysis" from the classified factual information and release the legal analysis. NY Times Br. at 8, 11, 16.

However, there is no "abstract legal analysis" in the Report of the sort that appears to be envisioned by plaintiffs. As set forth in the accompanying Supplemental Declaration of Mark Bradley (the "Supp. Bradley Decl."), the Report contains no analysis that is not inextricably intertwined with information about classified intelligence activities. Supp. Bradley Decl. ¶ 9. And, as even the plaintiffs recognize, the law is clear that non-exempt information that is "inextricably intertwined" with exempt information is not segregable and need not be disclosed. *See* NY Times Br. at 23 (citing cases); *see also Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.,* 463 F.3d 239, 249 n.10 (2d Cir. 2006).

Here, as Mr. Bradley explains, while the Report refers to the statute that authorizes and forms the basis of the classified intelligence collection operation, any reference to that statutory basis is inextricably intertwined with and not segregable from the description of the intelligence collection operation. Supp. Bradley Decl. ¶9. Mr. Bradley explains that no part of the Report can be meaningfully separated from classified information such that its release would not also reveal classified information. *Id.* In short, the Report does not contain any legal analysis, abstract or otherwise, that is not bound up with the description of the intelligence collection operation. In the judgment of the Executive Branch, release of any portion of the Report,

whether characterized as legal analysis or not, would disclose classified information about the intelligence collection operation, and that judgment is entitled to this Court's deference. *See Ferrigno v. U.S. Dep't of Homeland Security*, 09 Civ. 5878 (RJS), 2011 WL 1345168, at *10 (S.D.N.Y. March 29, 2011).

3. The Government's Declarations Provide Sufficient Detail

Plaintiffs also contend that the Government's declarations are not sufficiently detailed to justify withholding the Report as classified. NY Times Br. at 15. But plaintiffs demand far more specificity than the law requires. An agency's Exemption 1 declaration must be "specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding," and it must demonstrate "that material withheld is logically within the domain of the exemption claimed," *King v. DOJ*, 830 F.2d 210, 217, 218 (D.C. Cir. 1987). At the same time, however, an Exemption 1 declaration need not contain "'factual descriptions that if made public would compromise the secret nature of the information.'" *Hayden v. NSA*, 608 F.2d 1381, 1384-85 (D.C. Cir. 1979).

a. The Unclassified Declaration Provides "Logical and Plausible" Grounds for Withholding the Report

Here, the Government has described the contents of the Report and the justification for withholding it with sufficient detail to allow the Court to evaluate whether the Report is properly classified. In its public filings, the Government has provided as complete a description of the Report as possible without revealing classified information: it is a report provided to Congress on a classified basis by the Attorney General and the Director of National Intelligence on February 2, 2011 relating to an intelligence collection operation authorized by Section 215 of the USA PATRIOT Act. Further, the Government has explained that the Report contains "specific descriptions" of the "manner and means by which the United States Government acquires

tangible things for certain authorized investigations pursuant to Section 215." Unclass. Bradley Decl. ¶ 9. In addition, if those descriptions were revealed, "highly sensitive intelligence activities, sources and methods" would be exposed. *Id.* In short, as the unclassified declaration explains, the Report was provided by high-level officials in the United States Government with responsibility for protecting national security to members of Congress with intelligence oversight responsibility, and describes an intelligence collection operation. Moreover, Section 215 is a public law, the contents of which are known: Section 215 permits the Government to apply to the Foreign Intelligence Surveillance Court ("FISA Court") for a court order directing the production of "any tangible things" for certain authorized investigations. 50 U.S.C. § 1861(a)(1).

Nor does the unclassified Bradley Declaration "merely restat[e] the standards" in the Executive Order, as plaintiffs argue. *See* NY Times Br. at 17. Rather, the declaration sets forth a "logical and plausible" basis, *see Wilner*, 592 F.3d at 73; *ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011), for Mr. Bradley's conclusion that harm would result from the disclosure of the Report. He explains that because the document describes an intelligence collection operation, the disclosure of the Report could provide insight into the nation's foreign intelligence capabilities that the United States' adversaries and foreign intelligence targets could use to evade the collection capabilities or to develop a means to degrade those capabilities. Notwithstanding plaintiffs' rhetoric, it is simply not an "empty blanket assertion" to posit that if a secret intelligence operation is made public, it becomes easier for an adversary to undermine that operation. *See Wilner*, 592 F.3d at 73. This is no less true for the intelligence collection operation described in the Report as it is for any other intelligence collection operation that relies

on secrecy for its effectiveness. *See, e.g., Azmy v. DOD*, 562 F. Supp. 2d 590, 600 (S.D.N.Y. 2008); *Larson*, 565 F.3d at 863.

To the extent that the Government's unclassified filings do not provide more extensive detail of the national security harm involved here, a more detailed discussion cannot be provided on the public record. *See Hayden,* 608 F.2d at 1384-85.

b. The Government's Submission of a Classified Declaration Is Proper

Moreover, should the Court need more detailed information than can be provided on the public record, the Government has provided further support for its withholding of the Report in a classified declaration. The classified declaration provides additional detail regarding the intelligence collection operation itself as well as the ways in which the United States' adversaries and foreign intelligence targets could use that classified information to the detriment of the United States. *See* Class. Bradley Decl.

Plaintiffs complain that the Government has relied too heavily on the classified declaration, NY Times Br. at 11, but in FOIA cases involving classified materials, the interest in an open adversarial process must be balanced against the concern that public disclosure of information during litigation will jeopardize national security. As one court in this District recently explained:

> Important as the constitutional right to due process and the judicial system's dedication to an adversarial process are, protecting the national security would be a futile effort if those interests automatically trumped national security concerns. The law reflects these competing objectives and allows for some sacrifice of the adversarial process in limited circumstances with national security is implicated.

ACLU v. DOD, No. 09 Civ. 8071 (BSJ), slip op. at 5 (S.D.N.Y. Jan. 24, 2012).

Here, the Government has submitted an *ex parte* classified declaration in order to protect what courts have recognized as a compelling interest in preventing public disclosure of sensitive and classified information. *Hamdan v. Rumsfeld*, 548 U.S. 557, 634–35 (2006).

In light of the Government's compelling interest in protecting national security, courts have consistently recognized (and exercised) their "inherent authority to review classified material *ex parte*, in camera as part of [their] judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *see also ACLU*, 09 Civ. 8071, slip op. at 2 ("[I]n the FOIA context, that reluctance [to rely on *ex parte* submissions] dissipates considerably when the case raises national security concerns"); *accord Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001). Indeed, in sensitive national security cases, "it is simply not possible to provide for orderly and responsible decisionmaking about what is to be disclosed, without some sacrifice to the pure adversary process," and "Congress has acknowledged that judges must sometimes make these decisions without full benefit of adversary comment on a complete public record." *Hayden,* 608 F.2d at 1385; *see In re New York Times Co.,* 577 F.3d 401, 410 n.4 (2d Cir. 2009) (courts must balance transparency with need to protect sensitive information); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) ("the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk").

Thus, when classified national security information is at issue, "*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm." *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (quoting *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983)). This is true in a wide variety of contexts, including FOIA. *Hayden*, 608 F.2d at 1385–86; *Pollard v. FBI*, 705 F.2d 1151, 1153–54 (9th Cir. 1983); *Amnesty Int'l USA v. CIA*, 728 F.

Supp. 2d 479, 507–08 (S.D.N.Y. 2010). In sum, in a FOIA case such as this, where "public itemization and detailed justification would compromise legitimate secrecy interests," it is "appropriate to receive affidavits in camera rather than in public." *Hayden*, 608 F.2d at 1385.

c. The Cases Cited by Plaintiff Challenging the Declarations Are Inapposite

The cases cited by plaintiffs for the proposition that the Government's declarations are inadequate are inapposite. *See* NY Times Br. at 17-18 (citing *Halpern v. FBI*, 181 F.3d 279 (2d Cir. 1999), *ACLU v. ODNI*, 10 Civ. 4419 (RJS), 2011 WL 5563520 (S.D.N.Y. Nov. 15, 2011), *El Badrawi v. DHS*, 583 F. Supp. 2d 285 (D. Conn. 2008), and *Associated Press v. DOD*, 498 F. Supp. 2d 707 (S.D.N.Y. 2007)). The courts in these cases found that the Government's declarations failed to provide the "reasonable specificity" needed for declarations to perform their "functional purpose" of allowing both the plaintiffs to contest the conclusions in the declarations and the courts the opportunity to engage in meaningful review. *See Halpern*, 181 F.3d at 293. But unlike the instant case, the cases all involved multiple documents and/or multiple redactions, and the courts' concerns focused on the fact that the declarations described categories of withheld documents or information, using language that was not specifically tailored to the particular documents or redactions at issue. Thus, these courts found that those declarations failed to provide the necessary context to explain why the documents were classified, and specifically how the release of any particular document would harm national security. *See Halpern*, 181 F.3d at 292-293; *ACLU v. ODNI*, 2011 WL 5563520, at * 4 -12; *El Badrawi*, 583 F. Supp. 2d at 314; *Associated Press*, 498 F. Supp. 2d at 711.

By contrast, the Unclassified Bradley Declaration makes clear that the single document at issue is a report submitted to Congress by the Attorney General and the Director of National Intelligence that "contains specific descriptions" of the ways in which the Government conducts

"certain authorized investigations pursuant to Section 215." Furthermore, the report "*describes* highly sensitive intelligence activities, sources and methods." *Compare* Unclass. Bradley Decl. ¶ 9 *with El Badrawi*, 583 F. Supp. 2d at 314 (document at issue contains "information *relating to* intelligence sources and methods) (emphases added). The Supplemental Bradley Declaration further clarifies that the Report "describes a classified intelligence collection operation." Supp. Bradley Decl. ¶ 9. By providing this understanding of the contents of the Report, the Government has provided the requisite specificity needed for the declarations to perform their "functional purpose," namely for plaintiffs and the Court to evaluate the Government's very specific description of the harm to national security that would result from its disclosure, namely that it "would provide our adversaries and foreign intelligence targets with insight into the United States foreign intelligence collection capabilities," which they could then use "to develop the means to degrade and evade those collection capabilities." Unclass. Bradley Decl. ¶ 9.

Moreover, in order to ensure that the Court has sufficient information, the Government has provided a classified declaration, setting forth additional detail that cannot be revealed on the public record, for the Court's review *in camera*. *See* Class. Bradley Decl.[2]

II. EXEMPTION 3 AUTHORIZES THE WITHHOLDING OF THE REPORT

The Government has also shown that the Report is exempt from release pursuant to Exemption 3. As explained in the Government's opening brief, the Report was properly withheld pursuant to Section 102A the National Security Act of 1947, as amended by the

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[2] While the Government does not dispute the Court's authority to conduct an *in camera* review of the Report itself, it bears noting that, contrary to plaintiffs' assertions, *see* NY Times Br. at 21-24, *in camera* review is discouraged in national security cases like this one. *See Larson*, 565 F.3d at 870.

Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i). *See* Gov. Opening Br. at 10. This statute protects intelligence sources and methods from unauthorized disclosure and indisputably qualifies as an Exemption 3 statute. *See New York Times Co. v. DOD*, 499 F. Supp. 2d 501, 512 (S.D.N.Y. 2007); *ACLU v. DOD*, 628 F.3d at 619. Here, the information in the Report is protected from disclosure by the National Security Act because the Report "describes highly sensitive intelligence activities, sources and methods." *See* Unclass. Bradley Decl. ¶ 9; Class. Bradley Decl.

Plaintiffs all but ignore the Government's invocation of Exemption 3 to withhold the Report, making only the unremarkable observation that the Government's ability to protect information from disclosure under the National Security Act is not "boundless," NY Times Br. at 14, but limited to "secrecy for 'intelligence sources and methods,'" *id*. The Government does not disagree, and does not invoke the National Security Act to protect anything other than intelligence sources and methods. *See* Unclass. Bradley Decl. ¶ 12; Class. Bradley Decl.

The cases cited by plaintiffs—*Founding Church of Scientology v. NSA*, 610 F.2d 824 (D.C. Cir. 1979); *ACLU v. ODNI,* No. 10 Civ. 4419 (RJS), 2012 WL 1117114 (S.D.N.Y. Mar. 30, 2012); *Navasky v.CIA*, 499 F. Supp. 269 (S.D.N.Y. 1980), and *Terkel v. AT&T*, 441 F. Supp. 2d 899 (N.D. Ill. 2006)—are cited for the unexceptional proposition that, as the *Navasky* court put it, the materials sought must "logically fall into the categories of 'intelligence sources and methods.'" *Navasky*, 499 F. Supp. 2d at 274. There can be no dispute on this issue in the instant case. As the Supreme Court held in *Sims*, the Government's discretion to determine what would constitute an unauthorized disclosure of intelligence and methods is "very broad." *CIA v. Sims*, 471 U.S. 159, 168-169. (1985). The Government has repeatedly stated, and its declarations demonstrate, that the Report describes an intelligence collection operation authorized by Section

215 of the USA PATRIOT Act. *See* Unclass. Bradley Decl. ¶ 9, Supp. Bradley Decl. ¶ 9, Class. Bradley Decl. Even without the benefit of the Government's classified filing, it is clear that an intelligence collection operation by definition describes intelligence sources and methods, which fall within the protection of Section 102A of the National Security Act and Exemption 3.[3] Furthermore, as explained in Part I (B)(2), *supra*, the Report's description of a classified intelligence collection operation does not contain any "abstract legal analysis." *See* Supp. Bradley Decl. ¶ 9. To the extent any portion of the Report could be characterized as legal analysis at all, such analysis is inextricably intertwined with information regarding legitimately shielded intelligence sources and methods. *See id.*

III. THE CONCEPT OF "SECRET LAW" IS NOT APPLICABLE IN THE CONTEXT OF EXEMPTIONS 1 OR 3

Despite plaintiffs' ominous invocation of the specter of "secret law" in this case, the concept of "secret law," also referred to as an agency's "working law,"[4] is simply not applicable here, where the Government is relying solely on Exemptions 1 and 3 to withhold the Report in full. The crux of plaintiffs' argument is that once information is labeled "secret law," it may not be withheld even when one of the nine FOIA exemptions would otherwise apply. But this misrepresents a body of FOIA law on this subject stretching back over three decades; "secret

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[3] The plaintiffs also complain that the Government did not claim Exemption 3 until litigation began. But the Government does not waive the right to assert an exemption simply because the agency has not asserted it at the administrative level. *See Adamowicz v. IRS*, 552 F. Supp. 2d 355, 361 n. 2 (S.D.N.Y. 2008).

[4] The terms "secret law" and "working law" are used interchangeably by the courts. *See, e.g.*, *Assembly of California v. United States Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) ("Exemption 5 cases contrast agency documents leading to a decision with documents explaining or interpreting a decision after the fact. Because an agency's interpretations of its decisions often become the 'working law' of the agency, documents deemed "post decisional" do not enjoy the protection of the deliberative process privilege. This insures that the agency does not operate on the basis of 'secret law.'" (citations omitted)).

law" is manifestly not a carve-out that trumps all FOIA exemptions. Rather, the term "secret law" arises primarily in the context of Exemption 5 and addresses the Government's invocation of the deliberative process privilege to justify the withholding of information; in such cases, courts consider whether a document is truly deliberative or whether the document is effectively operating as the agency's "working law." Plaintiffs do not cite a single case, nor is the Government aware of any case, in which a court has even mentioned the term "secret law" as part of its analysis of Exemptions 1 or 3. Instead, plaintiffs have cherry-picked quotes that incorporate the phrase "secret law," often in *dicta*, from cases analyzing the withholding of documents under Exemptions 5 and the no longer extant Exemption High 2, and employ these out of context quotes in an attempt to shoehorn the facts of this case into a wholly inapplicable framework.

A. The Concept of "Secret Law" Arises in the Context of Exemption 5

The contours of the "secret law" or "working law" concept have been defined primarily in the context of whether the information in a document is predecisional and deliberative, and therefore protected from disclosure under Exemption 5.[5] Specifically, the term describes a particular type of agency rule or procedure embodied in a non-public document, which has in

[5] There is also a line of cases that refer to the term "secret law" in connection with the now defunct FOIA exemption known as "High 2," which allowed agencies to withhold information the release of which would risk circumvention of regulations or statutes. *See Crooker v. ATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (*en banc*), *overruled by Milner v. Department of Navy*, 131 S. Ct. 1259 (2011). Generally, in these cases courts either allowed the information to be withheld under High 2, distinguishing it, often in *dicta*, from the type of "secret law" that is incompatible with the concepts of open government that FOIA advances, *see, e.g., Caplan v. Bureau of Alcohol Tobacco & Firearms*, 587 F.2d 544, 548 (2d Cir. 1978), or find that the information at issue does not fit within the boundaries of High 2, and labeling it "secret law" without any sort of separate "secret law" analysis, s*ee, e.g., Jordan v. DOJ*, 591 F.2d 753, 763-771; *cf. Cuneo v. Schlesinger*, 484 F.2d 1086, 1091 (D.C. Cir. 1973) (noting that it was unclear whether the withheld information contained "secret law" and remanding for the Government to provide additional justification for its withholdings pursuant to Exemptions 2 and 5).

practice lost its predecisonal and deliberative character, and which could have an impact on the substantive or procedural rights of individual persons. The D.C. Circuit has explained that "working law" means "those policies or rules, and the interpretations thereof, that either create or determine the extent of the substantive rights and liabilities of a person," *Afshar v. Department of State,* 702 F.2d 1125, 1141 (D.C. Cir. 1983) (internal quotation marks and citations omitted), *i.e.*, those policies and rules that a private party may have cause to rely on to guide his or her conduct. *See also, e.g., Coastal States Gas Corp.v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) ("working law" or "secret law" consists of agency guidance or precedent applied by agency staff in their dealings with the public); *PHE, Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993) (secret law is "materials that define standards for determining whether the law has been violated"). Similarly, the Second Circuit has defined "working law" as "the reasons which [] supply the basis for an agency policy actually adopted." *Nat'l Council of La Raza*, 411 F.3d 350, 360 (2d Cir. 2005) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975)).[6]

This conception of secret law makes sense in the context of Exemption 5, and specifically the deliberative process privilege, because it helps to distinguish between the types of

[6] Even if the Report had been withheld pursuant to the deliberative process privilege under Exemption 5, which as simple matter of fact it was not, the Report would not fall within this definition of secret or working law. As described in Part I, *supra*, the Report at issue addresses intelligence activities authorized by the FISA Court and conducted pursuant to a public statute with the knowledge of and oversight by Congress. It does not provide the reasons or "basis for an agency policy actually adopted," *La Raza*, 411 F.3d at 360, nor does it "create or determine the extent of the substantive rights and liabilities of a person," *Afshar,* 702 F.2d at 1141, that such a person might rely on to guide his or her conduct. Plaintiffs have cited no case, and the Government is not aware of any case, which would provide any support whatsoever for characterizing a report to Congress describing a specific court-authorized and congressionally overseen intelligence operation conducted pursuant to a public statute as an agency's "secret law." But in any event, the Government has not claimed Exemption 5 as a basis for withholding the Report, and even if it had, as set forth in Part IV, B, *infra*, the Report would still be properly withheld under Exemptions 1 and 3. *See Sears*, 421 U.S. at 161.

communications that are entitled to the protections of the privilege, *i.e.*, non-final deliberations, and communications that are not. Under the deliberative process privilege, the Government is able to withhold predecisional and deliberative documents in order to "prevent injury to the quality of agency decisions," but cannot withhold "communications made after the decision and designed to explain it." *Sears*, 421 U.S. at 151, 152. The Supreme Court defined the latter as the agency's "working law," because "it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached," and "the public is vitally concerned with the reasons which [] suppl[ied] the basis for an agency policy actually adopted." *Id. See also Sterling Drug Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971) (finding non-public final FTC decision memorandum not comprised of "the ideas and theories which go into the making of the law, they are the law itself, and as such they should be made available to the public. . . . to prevent the development of secret law within the Commission"). In other words, the concept of "secret law" arises in the context of Exemption 5 because withholding such information is not compatible with the underlying purpose of the deliberative process privilege—to help ensure "the quality of agency decisions by preserving and encouraging candid discussion between officials." *La Raza*, 411 F.3d at 356.

Plaintiffs misrepresent the law, however, by suggesting that in addition to an analysis of the relevant exemption itself, there is a separate "secret law" analysis, or a "secret law" exclusion, that would trump the otherwise valid invocation of a FOIA exemption. *See* ACLU's Memorandum of Law in Opposition to the Government's Motion for Partial Summary Judgment and in Support of Its Cross-Motion for Partial Summary Judgment ("ACLU Br.") at 9 (the Report "comprises secret law, and thus cannot be withheld as classified"), 13-16; NY Times Br. at 20. But there is no blanket carve-out from FOIA's nine exemptions. As the Supreme Court

has explained, "every document generated by an agency is available to the public in one form or another, *unless* it falls within one of the [FOIA's] nine exemptions." *Sears*, 421 U.S. at 136 (emphasis added). Thus, in a FOIA case, the only relevant inquiry as to whether a document must be disclosed is whether that document properly falls within the scope of one of those nine exemptions. Indeed, plaintiffs have not cited a single case in which a court has found that a document that otherwise could have been withheld pursuant to one of the nine FOIA exemptions must instead be disclosed because it constitutes "secret law." Rather, in the cases cited by plaintiffs, the courts' decisions as to whether the documents at issue were required to be disclosed turned on those courts' analyses of the specific requirements of the particular exemption claimed—Exemption 5 or the now defunct Exemption High 2.

For example, in *La Raza*, the Second Circuit did not find that, notwithstanding the applicability of Exemption 5, the Office of Legal Counsel memorandum at issue should be disclosed because it was secret law. Rather, the Court found that the Government had improperly invoked Exemption 5 based on the deliberative process privilege. As the Court explained, the memorandum could not be withheld as privileged because it lost its predecisional character once it was adopted by the agency, and thus was effectively operating as the agency's working law. *La Raza*, 411 F.3d at 356, 360. *See also Pub. Citizen, Inc. v. Office of Mgmt & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010) (holding Exemption 5 inapplicable because document reflecting OMB policy on how it carries out its responsibilities not predecisional or deliberative and thus "fit comfortably within the working law framework").

In none of these cases did the courts conduct anything akin to plaintiffs' suggested "secret law" analysis—that is, apply "secret law" as a freestanding rationale to require disclosure under FOIA. Rather, the courts "look[]to the need to prevent accumulation of secret law as

additional support for the independent conclusion that postdecisional memoranda should be released because their publication would not interfere with the consultative process of government decisionmaking," *Afshar,* 702 F.2d at 1142 (describing the Supreme Court's decision in *Sears*), or to distinguish the document at issue from secret or working law. *See, e.g., Caplan*, 587 F.2d at 548 (clarifying that the law enforcement manual at issue is not secret law and meets requirements of High 2 exemption). *See also, e.g.*, *Jordan*, 591 F.2d at 781-782 (Judge Bazelon providing three-paragraph concurring opinion discussing dangers of secret law following 25-page majority opinion providing detailed analysis explaining why Exemptions 2 and 5 were inapplicable); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1118 n.117 (Wilkey, J., dissenting) ("Judge Bazelon joined the opinion of the court [in *Jordan*] without stating any reservations whatsoever about its rationale. His decision to make some additional comments did not diminish the meaning of his adherence to the majority opinion."). Accordingly, the only legal analysis relevant to the holding in the cases cited by Plaintiffs is whether the claimed FOIA exemption—Exemption 5 or Exemption High 2—applies.

B. There Is No Legal or Logical Connection Between the Concept of "Secret Law" and Exemptions 1 or 3

Nor is there any reason to extend the "secret law" concept to Exemptions 1 or 3. Despite plaintiffs' attempts to conflate the meaning of the word "secret" in the phrase "secret law" with the use of the word "secret" for national security purposes, *see*, *e.g.*, ACLU Br. at 1 ("the Court should reject the government's attempt to keep secret its legal interpretation of Section 215"), the concept of "secret law" as defined in the case law described above is completely separate and distinct from national security information that has been classified as "secret" or "top secret" in accordance with the Executive Order 13526. The Government has not invoked Exemption 5 in this case, and is relying solely on Exemptions 1 and 3 to withhold the Report in full. While the

withholding of "secret law" is not compatible with the underlying purpose of the deliberative process privilege, it is wholly irrelevant to the underlying purpose of both Exemption 1, which is to withhold information the disclosure of which would cause harm to national security, and Exemption 3, which "permits government agencies to maintain the secrecy of information that is specifically exempted from disclosure by certain statutes." *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) (internal citations omitted). In this case, the statute that exempts the Report from disclosure pursuant to Exemption 3 is the National Security Act, which requires the Government to protect intelligence sources and methods. 50 U.S.C. § 403-1. There is no inherent contradiction between the withholding of an agency's working law and the need to protect classified information. In other words, a document could in theory fall squarely within the definition of secret or working law as defined in the context of Exemption 5, but still be classified "secret" or "top secret" in order to prevent harm to national security. There is also no inherent contradiction in the withholding of an agency's working law and the Government's need to protect intelligence sources and methods.

To find otherwise would turn FOIA analysis on its head, and would in effect allow the disclosure of information despite a court's own acknowledgement that to do so would cause the national security harm and expose sensitive intelligence sources and methods. However, the law is clear that "[t]he Court's role with regard to Exemption 1 is only to review the sufficiency and reasonableness of the agency's explanation for its classification decision, giving the agency's determination the heightened deference it is due under the law." *People for the Am. Way Fund. v. NSA*, 462 F. Supp. 2d 21, 33 (D.D.C. 2006). *See also ACLU v. DOJ*, 265 F. Supp. 2d 20, 31 (D.D.C. 2003) ("That the public has a significant and entirely legitimate desire for th[e] information simply does not, in an Exemption 1 case, alter the analysis."); *Wilner*, 592 F.3d at

72 ("Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage") (internal citations omitted) .

Plaintiffs provide no support for the proposition that if a document could be considered secret or working law, the protections of Exemptions 1 and 3 are no longer available. To the contrary, the Supreme Court has noted explicitly that if a document constitutes working law and therefore cannot be withheld under Exemption 5, it "may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5." *Sears*, 421 U.S. at 161. *See also Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002) ("the District Court correctly determined that IRS need not segregate and release agency working law from TAs withheld in their entirety pursuant to the attorney work product privilege").

Accordingly, the only relevant analysis in this case is whether Exemptions 1 and 3 in fact apply. As set forth above and in the Government's opening brief, because the Report is indeed currently and properly classified, Exemption 1 authorizes its withholding. Also as set forth above and in the Government's opening brief, because the Report contains intelligence sources and methods, it is exempt from disclosure under the National Security Act and Exemption 3 authorizes its withholding. There is simply no basis for also conducting a separate analysis to determine whether the Report fits into the framework of "secret law" as understood in the context of the deliberative process privilege under Exemption 5.

CONCLUSION

The Government's motion for summary judgment in *The New York Times Co. v. United States Department of Justice,* 11 Civ. 6990, and partial summary judgment in *American Civil Liberties Union v. Federal Bureau of Investigation*, 11 Civ. 7562, should be granted.

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Respectfully submitted,

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